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No. 07-1383

IN THE SUPREME COURT OF THE UNITED STATES

SHOZDIJIJI SHISINDAY, a/k/a DANNY DEAN THOMAS,

Petitioner,

v.

NATHANIEL QUARTERMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

STEVEN C. HERZOG
(Counsel of Record)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

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CAPITAL CASE

I.

THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE INTRODUCTION OF GILLIAM'S TESTIMONY WAS A *RIGGINS* VIOLATION, EXEMPT FROM HARMLESS-ERROR REVIEW

In *Riggins* v. *Nevada*, 504 U.S. 127 (1992), the Court held that a defendant who had been forcibly medicated with anti-psychotic drugs at trial was entitled to a new trial without having to prove actual prejudice, because—due to the nature of the error—such efforts would be "futile" and "purely speculative." *Id.* at 137. Petitioner submits that what the State did here, namely obtain testimony against Petitioner at a trial during which he was forcibly medicated without justification, and then use that evidence to convict him and sentence him to death, violates *Riggins*. Respondent argues that because this testimony was obtained in one trial, and then used in a second trial, its use was somehow no longer a *Riggins* violation, but rather a Confrontation Clause violation. The Court, Petitioner submits, should grant certiorari to resolve this issue.

Whether the introduction of the Gilliam testimony was a *Riggins* violation is relevant to whether the error that occurred in Petitioner's case is subject to harmless-error review. The Fifth Circuit, Petitioner submits, clearly erred when it "disagree[d]" with Petitioner's argument that one who "establishes a *Riggins* violation...need not prove prejudice or harm to obtain relief" and ruled that the harmless-error

standard in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), should apply. (App. A at A-16.)[1] Indeed, Respondent concedes that *Riggins* violations are not subject to harmless-error analysis. (*See* Resp't's Br. Opp'n at 12.) Consequently, Respondent labors to persuade the Court that Petitioner's case is distinguishable from *Riggins*.

Respondent first suggests that because the federal district court which granted Petitioner relief in 1997 also denied relief on his competency claim, that court necessarily found that the medication did not adversely affect him. Respondent's argument grossly misstates the actual facts. The record before the district court in 1997 amply supported its finding that the medication had adverse effects on Petitioner, and seriously impaired his ability to understand the proceedings and participate in his trial. (*See* Pet. at 8, 14; Apps. E, H ,I, J ,K, L, M.) The district court's findings are law of the case and no longer subject to review.

Respondent also attempts to recast Petitioner's claim as a claim that "the admission of [Gilliam's testimony] violated [Petitioner's] right to confrontation under *Riggins* because he was unable to adequately cross-examine Gilliam at his first trial due to his medicated state." (Resp't's Br. Opp'n at 1.) While Petitioner has Confrontation Clause rights that both underlie and exist independently of *Riggins*, and which are addressed separately in this brief, Petitioner does

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[1] All references to "App." are to the appendices to the Petition. References to "Supp. App." are to the appendices to this Reply brief.

not claim his rights under *Riggins* were infringed only because he was unable to adequately cross-examine Gilliam. Rather, Petitioner's claim is that he was entitled to be mentally present at his trial, and that because he was involuntarily medicated, he was denied the entire panoply of rights that underlie *Riggins*, including the right to be present at his trial, the right to consult with counsel, and the right to cross-examine witnesses. All of these rights were again violated when testimony obtained in violation of *Riggins* was used to convict and sentence him to death at his retrial.

Petitioner submits that Respondent fails to grasp the essence of *Riggins*—namely, that once a *Riggins* violation is found, any attempt to assess prejudice or harm from that violation is futile, because the effect of the medication on the defendant and his ability to participate in his trial cannot be assessed from a trial record. *Riggins* prescribes a one-step process—if the court finds that a defendant has been forcibly medicated without the requisite showings to justify the medication—the defendant is entitled to a new trial. There is no analysis of harm.

The Court made clear in *Riggins* that the unjustified forcible medication of defendant with anti-psychotic drugs during his trial can be cured only through a retrial. But when the State reads testimony obtained in violation of *Riggins* at that retrial, the remedy afforded in *Riggins* is completely undermined. The rulings of the lower courts in this case, and the positions articulated by Respondent in its Opposition Brief, evince a real need for the Court to clarify its ruling in *Riggins*, and in particular, to act to ensure that *Riggins* violations are appropriately remedied.

The Court should grant certiorari in this death penalty case to address this important issue.

II.

THIS COURT CAN AND SHOULD GRANT CERTIORARI TO DECIDE WHETHER AND HOW HARMLESS-ERROR ANALYSIS APPLIES TO CONFRONTATION CLAUSE VIOLATIONS

A. If the Admission of Gilliam's Testimony is Considered a Confrontation Clause Violation, the Court Can and Should Decide Whether Harmless-Error Analysis Applies to Such Violations.

Respondent offers several reasons why this Court should not grant review to consider Petitioner's arguments that Confrontation Clause violations like the one in this case should not be subject to harmless-error analysis. None of Respondent's arguments are persuasive.

First, the Court has jurisdiction to hear this claim. Petitioner properly "pressed" below the claim that the violation of his Confrontation Clause rights should not be subject to harmless-error analysis. *See U.S.* v. *Wells*, 519 U.S. 482, 488 (1997). In his federal habeas petition and brief before the Fifth Circuit, Petitioner argued that the introduction of Gilliam's testimony at his second trial violated his rights under the Confrontation Clause. (*See* Supp. App. A at A-1; Supp. App. B at B-5.) Petitioner

specifically argued before the Fifth Circuit that harmless-error analysis should not be used to assess the effect of the introduction of this testimony. (*See* Supp. App. B at B-34.) In fact, Respondent characterized this claim as a Confrontation Clause argument. (Resp't's Br. Opp'n COA at 30) ("ShisInday argues that the court below improperly applied a harmless-error analysis to reject his underlying Confrontation Clause claim").

Respondent argues that the Court has no jurisdiction to hear this issue because Petitioner did not cite *Crawford* v. *Washington*, 541 U.S. 36 (2004), in arguing that harmless-error analysis should not apply to the violation of his Confrontation Clause rights. While Petitioner did not cite *Crawford* below, his reliance on *Crawford* is not a new claim. It is merely "a new argument to support what has been his consistent claim." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). The introduction in a petition for certiorari of a new argument in support of a claim pressed below does not deprive this Court of jurisdiction. A petitioner is not "limited to the precise arguments [he] made below" when bringing an issue before this Court, *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992); and "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim." *Id.* Furthermore, jurisdiction is particularly appropriate where the "issue is ... 'in a state of evolving definition and uncertainty.'" *Va. Bankshares* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (quoting *St. Louis* v. *Praprotnick*, 485 U.S. 112, 120 (1988)).

Second, Respondent's argument that Petitioner has misread *Crawford* is wholly disingenuous. Petitioner does not argue that *Crawford* squarely addresses whether or not harmless-error review applies to Confrontation Clause violations. Rather, Petitioner argues that—in light of the Court's decisions in *Crawford* and recently in *Giles* v. *California*, 128 S. Ct. 2678 (2008), which elaborated on the Clause's original intent, significance and logic—the Court should revisit the issue of the appropriate standard of review for Confrontation Clause errors involving a deprivation of the right to cross-examination.

Third, Respondent argues that to the extent Petitioner makes arguments based on *Crawford*, his claim is barred by *Teague* v. *Lane*, 489 U.S. 288 (1989). Respondent raises *Teague* for the first time in its opposition to this Petition, and its *Teague* defense has thus been waived. *See, e.g.*, *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1046 (2008); *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990). This claim was pressed and passed on below and Respondent was on notice of it. Respondent failed to raise a *Teague* defense before the Fifth Circuit and should not be permitted to do so now.

Lastly, Respondent's fourth objection—that *Coy* v. *Iowa*, 487 U.S. 1012 (1988), has definitively decided the issue of the appropriate standard of review of Confrontation Clause violations—simply confirms why review is now appropriate. *Coy* was decided in 1988, long before the Court's decisions in *Crawford* and *Giles* that Petitioner submits change the landscape for the review of such claims, and which give rise to the need to address this issue. Furthermore, *Coy* did not

involve the right to cross-examination, which was violated in Petitioner's trial and on which the Confrontation Clause analysis in *Crawford* and *Giles* focused. Cross-examination, more than any other aspect of confrontation, involves an exchange in court whose outcome is unpredictable; thus, denial of the right to cross-examine should not be subject to harmless-error analysis.

B. *Fry* does not Resolve Confusion in the Lower Courts as to How to Apply *Fulminante's* Trial-error/Structural error Analysis to Confrontation Clause Cases.

Petitioner also argues that the Court should grant certiorari to resolve confusion in the lower courts regarding how *Arizona* v. *Fulminante's* trial-error/structural-error analysis applies to Confrontation Clause claims. 499 U.S. 279 (1991). Respondent suggests, with minimal analysis, that *Fry* v. *Pliler*, 127 S. Ct. 2321 (2007), resolved the confusion on this issue. *Fry* does not even reference the conflict that Petitioner points to, let alone resolve it. *Fry* decides only whether federal courts should apply the *Brecht* standard in cases when the state court did not apply the standard announced in *Chapman* v. *California*, 386 U.S. 18 (1967). *Fry* does not address how courts should apply the trial-error/structural-error framework in Confrontation Clause cases, or clarify the lower courts' confused application of *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986) and *Brecht*.

Moreover, Respondent's argument that *Teague* bars the Court from deciding this claim on its

merits is also incorrect. To the extent Petitioner seeks new law on this point, that law concerns only the appropriate standard of review in federal habeas proceedings and does not affect how state courts should decide constitutional claims raised on direct appeal. Therefore, *Teague* does not apply. *See Rodriguez* v. *Chandler*, 382 F.3d 670 (7th Cir. 2004).

This Court has not considered *Teague* relevant when articulating the appropriate standard of review of constitutional error on federal collateral review. In *O'Neal* v. *McAninch*, 513 U.S. 432 (1995), for example, the Court held, without addressing *Teague*, that when a federal judge in habeas proceedings is in grave doubt about whether a trial error involving constitutional law had a substantial and injurious effect on the jury's verdict, that error is not harmless. Indeed, the Seventh Circuit has explicitly recognized that *Teague* does not bar the application of new standards of review of constitutional error in federal habeas proceedings. *See Rodriguez*, 382 F.3d at 673 ("*Teague* controls the application on collateral review of new rules governing the conduct of police, prosecutors, or courts preceding the verdict and sentence—that is, the primary conduct under review in the collateral attack—but not the standards by which the federal court conducts its own review. We therefore decide whether the error was harmless using currently applicable federal rules."); *see also Rodriguez* v. *Chandler*, 492 F.3d 863, 865 (7th Cir. 2007).

In addition, Respondent has waived any *Teague* defense by not raising it in the Fifth Circuit. *See, e.g.*, *Danforth*, 128 S. Ct. at 1046; *Collins*, 497 U.S. at 41. Finally, to the extent Respondent's *Teague*

arguments are not waived and are in conflict with the authorities discussed above, they provide yet another reason for the Court to grant certiorari—to address the application of *Teague* to claims seeking the "refinement of harmless-error analysis for the federal judiciary," *Rodriguez*, 492 F.3d at 865.

C. Even if Harmless-Error Analysis Applies to the Improper Introduction of Gilliam's Testimony, There Was Significant Harm.

Gilliam's testimony was critically important in convincing the jury that Petitioner shot Ms. Harrison—the allegation that led to his conviction and sentence of death. Credible evidence introduced at trial suggested that Petitioner's confession—the only evidence suggesting Petitioner was the shooter—was both coerced and unreliable. 21 R.R. 20-22.[2] Because the reliability of the confession was at issue, the prosecution sought to present other evidence supposedly corroborating the confession.

Gilliam's testimony was the strongest piece of such corroborating evidence because it was *the only unbiased evidence* bearing on Petitioner's alleged ownership of the murder weapon. While Respondent contends that "[t]he gun...had already been identified as ShisInday's gun by Martha Tarver, Doyle Peels, and...Ronald McHenry," (Resp't's Br. Opp'n at 18), each of these witnesses was a family member or close friend of the Peels family. *See* 15 R.R. 24-26, 15 R.R. 88-89, 15

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[2] All such references are to the trial transcripts of Mr. ShisInday's 1998 re-trial.

R.R. 119-20. Without Gilliam's testimony to support the questionable confession, there was little in the case pointing to Petitioner as the shooter—a critical factor in the jury's likely assessment of guilt and punishment. There was a reason why the State chose to offer this evidence over Petitioner's objections, knowing that it raised, at the very minimum, significant appeal issues. It was because the State knew that it might not obtain a capital murder conviction and death sentence without this evidence.

III.

THIS COURT HAS JURISDICTION TO CONSIDER WHETHER ARTICLE 37.0711 OF THE TEXAS CODE OF CRIMINAL PROCEDURE ("TCCP") UNCONSTITUTIONALLY MISLEADS JURIES AND THIS CLAIM IS NOT TEAGUE BARRED

Respondent argues that the Court lacks jurisdiction to hear Petitioner's claim that a Texas statute had the effect of unconstitutionally misleading jurors in his case about their ability to effect a life sentence. Respondent's arguments ignore the fact that (1) the parties have fully understood that the constitutionality of TCCP Art. 37.0711 has been at issue in this case since the trial court rejected Petitioner's requested deadlock instruction on the basis of that provision, and (2) the issue of whether Petitioner was unconstitutionally denied a deadlock instruction was addressed by the Fifth Circuit.

During jury deliberations, the prosecution objected to Petitioner's requested deadlock instruction

stating, "I would object to that instruction being given pursuant to Art. 37.071., Sec. 2. I believe it is improper for the jury to be told the result of their hanging." (App. Q at Q-4.) The court immediately denied the requested instruction. *Id.* From that moment forward all parties clearly understood that the State's objection to the requested instruction and the court's denial of it were based on Art. 37.071's prohibition, and that Petitioner's subsequent appeals regarding the requested instruction challenged a refusal to provide an instruction based on the ban set forth in this statute.

Before the Fifth Circuit, Petitioner expressly argued that the trial court's refusal to instruct the jury that a deadlock would result in an automatic life sentence affirmatively misled the jury. (*See* Supp. App. B at B-2.) Petitioner argued that the refusal to give the deadlock instruction was a violation of due process, and also argued—by citing *Romano* v. *Oklahoma*, 512 U.S. 1 (1994) and in rebutting argument based on *Jones* v. *U.S.*, 527 U.S. 373 (1999)—that the trial court's failure to provide the deadlock instruction violated the Eighth Amendment. (*See* Supp. App. B at B-2.)

The Fifth Circuit expressly addressed this claim, holding—in response to Petitioner's complaint about the trial court's failure to instruct the jury that its inability to reach a verdict on the death penalty would result in the imposition of a life sentence—that *Jones* precluded granting a COA on the issue of whether an accused facing the death penalty is "entitled to an instruction as to the effect of a sentencing deadlock." (App. A at A-15.) The Fifth Circuit thus clearly passed on the claim that not

providing the requested instruction was a constitutional error.

Petitioner's arguments that the trial court's refusal to give the requested deadlock instruction was unconstitutional, and that the Texas law that barred the trial court from giving the requested instruction is unconstitutional are thus two intimately connected arguments in support of the same claim—that he was unconstitutionally denied an instruction on the consequences of a jury deadlock that was necessary to prevent his jury from being misled about its role. Petitioner has consistently raised this claim at every level of his state and federal appeals.

This Court has made it clear that a litigant seeking review of a claim properly raised in the lower courts possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below. *See Lebron*, 513 U.S. at 379. The Court has also held that a litigant can make different arguments in support of the same general claim. *See Yee*, 503 U.S. at 534-35. It is the Court's "traditional rule" that it "may address a question properly presented in a petition for certiorari if it was 'pressed [in] or passed on' by the Court of Appeals." *Wells*, 519 U.S. at 488 (quoting *U.S.* v. *Williams*, 504 U.S. 36, 42 (1992)). The essence of the constitutional claim Petitioner raises was both "pressed in" and "passed on" by the Fifth Circuit, and is properly before the Court now.

In its opposition brief, Respondent raises for the first time the argument that *Teague* bars

Petitioner's claim regarding the unconstitutionality of the trial court's refusal to instruct the jury about the consequences of a deadlock. Even if this claim could be said to seek a "new rule" (and it is not clear that it does), Respondent was on notice in the lower courts and waived any *Teague* defense by not raising it at that time. *See, e.g.*, *Danforth*, 128 S. Ct. at 1046; *Collins*, 497 U.S. at 41.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court issue the requested writ of certiorari.

Dated: July 23, 2008

Respectfully submitted,

STEVEN C. HERZOG
(Counsel of Record)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

Of Counsel:
BETH PACKMAN WEINMAN
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

ROSA ELIADES
ELIADES LAW, PLL
306 Main Street, 3rd.
Houston, TX 77002
713-222-0610

SUPPLEMENTAL APPENDICES

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Supplemental Appendix A

Excerpt from Federal Petition for Writ of Habeas Corpus filed in Southern District of Texas Dated March 1, 2006

(pp. 37-39)

TESTIMONY INTRODUCED AT HIS SECOND TRIAL VIOLATED SHISINDAY'S RIGHTS UNDER THE CONFRONTATION CLAUSE

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." This right, as the Supreme Court observed in *Crawford*,[13] can be traced back to common law, and was well known to the Framers. Commented the Court:

> [t]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.
>
> *Crawford*, 541 U.S. at 53-54.

Justice Scalia, writing for the majority, noted that with the holding of *Crawford*, the Court has abandoned the 'indicia of reliability' test promulgated in *Ohio v. Roberts*, 448 U.S. 56 (1980), in favor of the core right assured by the Confrontation Clause: the right to confront, and cross-examine, witnesses.

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[13] *Crawford v. Washington*, 541 U.S. 36 (2004).

Crawford, 541 U.S. at 68-69. "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59.[14] u Thus, the holding of Crawford is simple: absent the opportunity for cross-examination, the prior testimony is barred.

In ShisInday's case, Judge Black ruled that the state prevented him from cross-examining witnesses at his first trial due to his forced medication. The trial court erred when it nevertheless admitted Gilliam's testimony from the first trial over defense objection.[15]

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[14] Notes Scalia wryly, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes. " 541 U.S. at 62.

[15] "First reason is this entire case was reversed on the Sixth Amendment issue based on the Riggins case concerning the defendant's lack of ability to cross-examine, effectively participate in the cross-examination and the confrontation of the witnesses in the case because he was drugged or on drugs during the time of his trial.

We think that the State's attempt now to introduce before the jury selection portions of that prior testimony for which the entire case was reversed because the defendant wasn't able to properly cross-examine the witnesses or participate in the cross-examination or confront the witnesses, could constitute error in this case and would be, in our estimation, reversible error." R.R. Vol. XVIII, p. 92, 112-15.

The State sought to introduce the testimony under Texas Rule of Evidence 804(a) (b) (1), the exception to the hearsay rule for prior testimony when the witness is unavailable due to death. It is disturbing to note that the trial court did not even bother to question the reliability of the testimony as outlined in *Roberts*, but summarily overruled the objection, admitting the testimony. This is precisely what *Crawford*, and the Confrontation Clause, forbids. As the Court pointed out, the Framers understood that "judges, like other government officers could not always be trusted to safeguard the rights of the people.... They were loath to leave too much discretion in judicial hands." *Crawford*, 541 U.S. at 67.

The Court's intent could not be clearer: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, 541 U.S. at 68-69. ShisInday did not have the opportunity to confront witness Gilliam. For the trial court to admit the testimony was a violation of ShisInday's fundamental Constitutional rights and for this reason alone, his case must be reversed.

Supplemental Appendix B

Excerpts from Petitioner's Brief in Support of a Certificate of Appealability ("COA") filed in the Fifth Circuit Court of Appeals on July 12, 2007

(pp. 28-31)

ISSUE NUMBER THREE: A CERTIFICATE OF APPEALABILITY SHOULD BE ISSUED ON WHETHER THE STATE COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS BY INSTRUCTING THE JURY TO CONTINUE TO DELIBERATE AFTER REPEATEDLY RECEIVING JURY NOTES INDICATING THE JURY WAS HUNG WITHOUT INFORMING THE JURY OF THE OUTCOME OF A HUNG JURY.

There were six hours of punishment testimony. The record shows that the jury was out for three days deliberating Petitioner's punishment, and for the last two days, continually sent out notes to the court detailing how the jurors were dead locked and that certain jurors were not budging. The court continued to instruct the jury to deliberate. A note by defense counsel in the record indicated he could hear the deliberations were becoming noticeably acrimonious from inside the courtroom. One note indicated that one of the hold out "would not change their mind for all of eternity." The jury charge instructed the jury that 10 votes were necessary for life sentence. However, the jurors were not informed that under the law, if they could not reach an agreement, the verdict would be life. The trial court's instruction, in light of circumstances and the law, was a coerced death sentence.

Petitioner argued before the district court and repeatedly in the State court that the trial court should have either accepted a hung jury verdict or

informed the jury that if they could not agree, the court would grant a mistrial and defendant would receive life sentence. Petitioner had filed a written request with the trial court to instruct the jury the outcome of a hung jury. (RR XXVI at 6). There were two hold-outs in the jury who probably found it hopeless to maintain their convictions because the jury instructions told them they needed 10 jurors for a life sentence.

Due process requires that a jury considering whether to impose death sentence must be provided accurate information that does not create confusion. *See Simmons v. South Carolina*, 512 U.S. 154 (1994) (jurors should not be allowed to speculate as to whether a defendant could be eligible for parole if he received a life sentence); *Romano v. Oklahoma*, 512 U.S. 1 (1994) (a jury cannot be affirmatively misled regarding its role in the sentencing process.). While it is true, the Supreme Court has held a jury does not have to be informed that if it cannot reach a unanimous verdict during a federal death sentencing, there will be a retrial, see *Jones v. United States*, 527 U.S. 373 (1999); that scenario is not misleading because the jury instructions did not misinform the jury of the law.

However, the jury in Petitioner's case was instructed, that 10 votes were required for a life sentence when in reality, only one is necessary because under Texas law, a hung jury is a life sentence. Unlike *Jones*, Petitioner is able to show that confusion *did* work to his detriment by the fact that the holdouts indicated they were confused by the instructions and would not have changed their votes had they known it made a difference.[3]

The misinformation, in combination with the instructions to continue deliberations and then the unanswered notes, all cumulate in a due process violation. Under *Lowenfield v. Phelps*, 484 U.S. 231, 237-39, (1988) a reviewing court must consider the propriety of the supplemental jury charge "in its context and under all the circumstances." Numerous cases support the position that the court's repeated instructions to deliberate and refusal to accept a hung verdict and grant the mistrial was unconstitutional. While in *Coleman v. Quarterman*, 456 F.3d 537 (5th Cir. 2006), this Court held the trial court's instruction were appropriate words of encouragement, the record establishes that the deliberations and notes from the jury in Petitioner's case differ from *Coleman*.

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[3] Even assuming the jurors' affidavits are not admissible evidence, the record indicates there was coercion. The juror indicated he would "hold out to all eternity", the record ntoes "acrimonious deliberations" just prior to the verdict, and it is not a stretch to glean from the length of the deliberations and the instructions to continue deliberating that the jurors who changed their mind felt they had no choice.

Most notably, the trial court in Petitioner's case sent out two plain notes ordering the jury to continue deliberating and the jury continues to reply that at least one individual refuses to change his mind until all of eternity. The next two notes by the jurors go *completely unanswered* for approximately a full day; then comes the verdict. The court's failure to respond to the jury and their notes sent the message that the jury must reach a conclusion, which has been held to be coercive and unconstitutional. *See Jenkins v. United States*, 380 U.S. 445 (1965); *United States v. Duke*, 492 F.2d 693 (5th Cir. 1974). While it is true that *Duke* and *Jenkins* do not involve habeas cases, the principle of coercion is not entirely inapplicable to habeas. Because the federal standard examines the totality of the circumstances, the cases cited below are not sufficient to establish that the State court followed federal law in Petitioner's case.

The court's numerous instructions to continue deliberating, in the light of the fact that the jury mistakenly believed that 10 jurors were needed for a life sentence, caused confusion and rendered a verdict based upon misinformation in Petitioner's trial. Ultimately, the Petitioner's sentence was not the true verdict rendered by the jury, but a coerced and unconstitutional, not unanimous death verdict. Reasonable jurist would differ whether the forced continued deliberation violate Due Process.

(pp. 32-35)

ISSUE NUMBER FOUR: A CERTIFICATE OF APPEALABILITY SHOULD BE ISSUED ON WHETHER THE STATE COURT ERRONEOUSLY REQUIRED THAT PETITIONER ESTABLISH HARM FROM THE TRIAL COURT'S ERROR IN INTRODUCING PRIOR TESTIMONY FROM THE FIRST TRIAL THAT THE FEDERAL COURT RULED WAS A RIGGINS VIOLATION AND ERRONEOUSLY HELD THERE WAS NO HARM.

A federal court reversed Petitioner's first trial for a *Riggins* violation finding he was unjustifiably forcibly medicated and that it violated his Due Process rights. Petitioner argues that the trial court violated *Riggins* and the confrontation clause by admitting testimony from the first trial at the second trial of Mr. Gilliam that Petitioner purchased the alleged murder weapon from him. The State court held that the testimony was cumulative and thus not a violation to the right of Confrontation. The federal court ruled that even if the admission of the prior testimony from Petitioner's first trial violated the Confrontation Clause, that the error did not have a substantial and injurious effect or influence in determining the jury's verdict. In effect, the district court erroneously required Petitioner to show harm from the *Riggins* violation.

In *Riggins v. Nevada*, 504 U.S. 127 (1992), the Supreme Court held that it was error to

order that the defendant be administered antipsychotic drugs during the course of his trial over his objections without findings that there were no less intrusive alternatives, that the medication was medically appropriate and that it was essential for the sake of the defendant's safety or the safety of others. The Court further found that the defendant did not have to prove harm to obtain relief. The Court explained as follows:

> Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril. ...
>
> Like the consequences of compelling a defendant to wear prison clothing, [citation omitted] the precise consequences of forcing antipsychotic medications upon Riggins cannot be shown form a trial transcript.

Riggins, 504 U.S. at 137.

Petitioner's first federal habeas court followed *Riggins* in reversing the first trial. The Court specifically found that "the pleadings [of habeas counsel] were replete with affidavits testifying to the adverse effect of the medication on petitioner's demeanor at trial." Next, the court found it "would be futile and purely speculative" to try to assess the impact of the medication on petitioner.

Riggins never conducted a harm analysis. Logic dictates that under the circumstances of this case, it would be difficult to establish specific harm. Mr. Gilliam was deceased at the time of the second trial. Accordingly, just as the Court in *Riggins* stated, any effort to prove prejudice from the introduction of Mr. Gilliam's testimony would be purely speculative because there is now manner in which to establish that Mr. Gilliam testimony could be impeached without him.

Since *Riggins*, the Supreme Court has not addressed the appropriate standard for review for such error. It would stand to reason though Riggins involves structural error of the type that defies harm analysis.

Recently, the Court held in *Fry v. Fitter*, 551 U.S. ____, 127 S.Ct. 2321 (2007) that, on collateral review by federal habeas court of criminal judgment of state court, federal court assesses prejudicial impact of state court's constitutional error under *Brecht v. Abrahamson*, 507 U.S. 619 (1993) "substantial and injurious effect" standard. The Court also did clarify there is room for an exception in an unusual case where there is deliberate and egregious error of the trial type, or one that infects the integrity of the proceeding. *Fry*, citing *Bretch*.

This error in introducing testimony from an invalid hearing was deliberate and egregious. After overmedicating Petitioner and making him sit through trial unconscious, and then, 17 years later, to introduce testimony from those proceedings without any way to refute it, is egregious. The proceeding's integrity is tainted with the blatant disregard of federal law's due process requirement. To hold any less would invalidate

the holding of *Riggins* and allow the State to circumvent federal law through the subsequent retrial.[4]

In sum, reasonable minds could differ on whether Petitioner must prove harm from this Riggins violation and there is sufficient cause for reasonable minds to differ whether there was actual harm from Mr. Gilliam's testimony.

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[4] Reasonable minds could agree that if a harm analysis is required, there was prejudice from the testimony of Mr. Gilliam. Mr. Gilliam presented only forensic testimony that linked Petitioner to the murder weapon. However, former defense counsel had only asked one question on cross examination, while Petitioner was forcibly medicated and falling at counsel table. Mr. Gilliam's testimony was hardly cumulative of the other testimony that Petitioner had the gun earlier in the day. The two witnesses that testified Petitioner had the gun earlier that evening were not as prejudicial as the uncontested testimony that Petitioner purchased the gun several weeks prior. Finally, the harm was exacerbated with evidence of blood scraping found on the gun that came from the victim that the Court of Criminal Appeals ruled was erroneously admitted.